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SERVICE DATE – DECEMBER 15, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 737

REVISED INSPECTION OF RECORDS AND RELATED FEES

Decided: December 12, 2016

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board or STB) is revising its regulations governing “Inspection of Records” and “Fees” in accordance with changes to the Freedom of Information Act (FOIA) made by the FOIA Improvement Act of 2016 (FOIA Improvement Act), Pub. L. No. 114-185 (2016). Pursuant to the FOIA Improvement Act, the Board is extending the deadline for administrative appeals, adding information on dispute resolution services, and amending the way fees are charged in certain circumstances.

DATES: These rules are effective on January 14, 2017.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 737 and be in writing addressed to: FOIA Officer, Office of the General Counsel, Surface Transportation Board, by mail at 395 E Street, S.W., Washington, DC 20423-0001, by facsimile at 202-245-0456, or by E-mail at FOIA.Privacy@stb.gov.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher at (202) 245-0355. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board is revising its regulations at 49 C.F.R. §§ 1001.3 and 1002.1(g) in accordance with the FOIA Improvement Act, which provides additional protections for parties requesting records held by the executive branch of the U.S. Government. Among the changes to FOIA, the FOIA Improvement Act requires agencies to allow requesters a minimum of 90 days to file an administrative appeal and that agencies allow for dispute resolution services at various times throughout the FOIA process. The FOIA Improvement Act also updates how fees are assessed in certain circumstances.

In accordance with the FOIA Improvement Act, the Board is revising § 1001.3 by: (1) changing the appeal deadline from 30 days to 90 days; and (2) adding a provision (under a new subheading) informing parties that they may seek dispute resolution services from either the

Board's FOIA Public Liaison or the Office of Government Information Services, National Archives and Records Administration. The Board is also revising 49 C.F.R. § 1002.1(g) by adding subparagraphs (15), (16), (17), and (18) to include the new requirements mandated by the FOIA Improvement Act regarding fees. The final rules are set forth in the Appendix to this decision.

Under the Administrative Procedure Act (APA), the public generally may participate in the promulgation of rules through a notice and comment period. 5 U.S.C. § 553(b) & (c). However, an agency may publish regulations in final form when the agency, for good cause, finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B).

The Board has determined that these amendments to its regulations relate to agency management, practice, and procedure, and make technical changes only as directed by statute, are not a matter of agency discretion, and provide additional protections to the public. Therefore, the Board finds that notice and public comment on these amendments are unnecessary. See 5 U.S.C. §§ 553(a)(2), 553(b)(A) & 553(b)(B).

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice and comment are not required under the APA for this rulemaking, the requirements of the RFA do not apply.

#### List of Subjects

##### 49 C.F.R. Part 1001

Freedom of information, Government employees, Inspection of records

##### 49 C.F.R. Part 1002

Freedom of information, Fees for records

#### It is ordered:

1. The final rules set forth in the Appendix to this decision are adopted. Notice of the rules adopted here will be published in the Federal Register.

2. The rules are effective on January 14, 2017.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

## Appendix

### Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1001 and part 1002 of title 49, chapter X, of the Code of Federal Regulations as follows:

#### **PART 1001 – INSPECTION OF RECORDS**

1. Revise the authority citation for part 1001 to read as follows:

Authority: 5 U.S.C. 552, 49 U.S.C. 1302, and 49 U.S.C. 1321.

2. Revise § 1001.3 to read as follows:

#### **§ 1001.3 Requests to inspect other records not considered public under 5 U.S.C. § 552.**

(a) Request and Determination. Requests to inspect records other than those now deemed to be of a public nature shall be in writing and addressed to the Freedom of Information Act Officer (FOIA Officer). The FOIA Officer shall determine within 20 days of receipt of a request (excepting Saturdays, Sundays, and legal public holidays) whether a requested record will be made available. If the FOIA Officer determines that a request cannot be honored, the FOIA Officer must inform the requesting party in writing of this decision and such letter shall contain a detailed explanation of why the requested material cannot be made available and explain the requesting party's right of appeal.

(b) Appeal. If the FOIA Officer rules that such records cannot be made available because they are exempt under the provisions of 5 U.S.C. § 552(b), an appeal from such ruling may be addressed to the Chairman. The Chairman's decision shall be administratively final and shall state the specific exemption(s) contained in 5 U.S.C. § 552(b) relied upon for any denial. Such an appeal must be filed within 90 days of the date of the FOIA Officer's letter. The Chairman shall act in writing on such appeals within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of any appeal. In unusual circumstances, as set forth in 5 U.S.C. § 552(a)(6)(B), the time limit may be extended, by written notice to the person making the particular request, setting forth the reasons for such extension, for no more than 10 working days. If the appeal is denied, the Chairman's order shall notify the requesting party of his or her right to judicial review. Charges shall be made as provided for in 49 C.F.R. § 1002.1.

(c) Alternative Dispute Resolution Services. Requesters may seek dispute resolution services from (1) the Board's FOIA Public Liaison by E-mail at FOIA.Privacy@stb.gov or by

mail, telephone, or facsimile as provided on the Board's website located at <https://www.stb.gov/stb/foia.html>, or (2) the Office of Government Information Services (OGIS) by mail to Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, Maryland, 20740-6001, by facsimile at (202) 741-5769, or by E-mail at [ogis@nara.gov](mailto:ogis@nara.gov).

## **PART 1002 – FEES**

3. Revise the authority citation for part 1002 to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(g)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

4. Add subparagraphs (15), (16), (17) and (18) after § 1002.1(g)(14)(vi) to read as follows:

### **§ 1002.1 Fees for records search, review, copying, certification, and related services.**

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(15) No fees will be assessed if the FOIA Officer fails to comply with any time limit under the FOIA or these regulations, and has not timely notified the requester, in writing, that an unusual circumstance exists. If an unusual circumstance exists, and timely, written notice is given to the requester, the failure to meet the time limit may be excused an additional 10 working days before fees are automatically waived under this paragraph.

(16) If the FOIA Officer determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to a request, fees may be charged if timely, written notice to the requester is provided and discussed with the requester via mail, E-mail, or telephone (or if at least three good-faith attempts are made to do so) regarding how the requester could effectively limit the scope of the request.

(17) If a court has determined that exceptional circumstances exist, a failure to comply with time limits imposed by these regulations or FOIA shall be excused for the length of time provided by court order.

(18) Fees may not be avoided by filing multiple requests at the same time. When the FOIA Officer reasonably believes that a requester, alone or with others, is breaking down one request into a series of requests to avoid fees, the requests will be combined, and the requester or requesters will be charged accordingly.